United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7497

To be argued by
ALEXANDER GIGANTE, JR.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

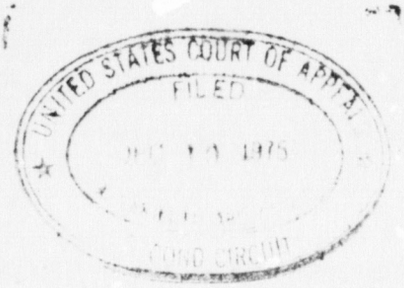
FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE, PAUL DUBRUL,

Plaintiffs-Appellants,

(Additional title appears on next page)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES BEAME, CODD, EISENPREIS, KOVE, GUGGENHEIMER, LOW, LAZAR, ZUCCOTTI, TARSHIS, O'DWYER, KARAGHEUZOFF AND THE CITY OF NEW YORK.



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-v.-

HUGH CAREY, ABRAHAM BEAME, DAVID L. YUNICH, MICHAEL J. COBB, ALFRED EISENPREIS, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, MICHAEL LAZAR, JOHN ZUCCOTTI, MORRIS TARSHIS, PAUL O'DWYER, J. DOUGLAS CARROLL, JR., WILLIAM J. RONAN, THEODORE KARAGHEUZOFF, P.E., JAMES MELTON, OGDEN REID, STATE OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7497

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PRELIMINARY STATEMENT

This is an action commenced pursuant to sec-

tion 304(a)(1) (42 U.S.C. §1857h-2(a)(1)) of the Clean Air Act, 77 Stat. 392 (1963), as amended* (42 U.S.C. §1857 et seq.) (hereinafter "Act"). Plaintiffs-appellants (hereinafter "plaintiffs") seek declaratory and injunctive relief against defendants-appellees (hereinafter "defendants") because of alleged violations of the requirements of the New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls (hereinafter "TCP"), which were adopted by the State and City of New York in accordance with the command contained in section 110 of the Act (42 U.S.C. §1857c-5). The instant appeal is from an order of the District Court (Duffy, J.) that denied plaintiff's motion for a preliminary injunction 1) enjoining an increase in the rate of fare charged by the New York City Transit Authority (hereinafter "NYCTA") and 2) compelling defendants to comply with certain requirements of the TCP.

ISSUES PRESENTED

1. Did the District Court abuse its discretion in denying plaintiffs' motion for a preliminary injunction temporarily enforcing the TCP, on the ground

*Amended by 79 Stat. 992 (1965); 80 Stat. 954, (Clean Air Act Amendments of 1966); 81 Stat. 485 (Air Quality Act of 1967); 84 Stat. 1676 (Clean Air Act Amendments of 1970; and 88 Stat. 246 (Energy Supply and Environmental Coordination Act of 1974).

that USEPA had not been made a party to the action?

2. Did the District Court err in denying plaintiffs' motion for a preliminary injunction enjoining NYCTA from increasing the transit fare and in dismissing the amended complaint as to NYCTA, when such fare increase did not constitute a violation of the Act or any other statute and no notice was given to or claim made against NYCTA?

STATEMENT OF THE CASE

On August 5, 1974, plaintiffs served directly on all the defendants herein, except NYCTA, a notice of violation, as required by section 304(b) of the Act. Said notice charged the defendants with noncompliance with the timetables and schedules adopted to implement the TCP.* Shortly thereafter, on August 22, 1974, the plaintiffs instituted a lawsuit identical to the instant action (Friends of the Earth, et al. v. Wilson, et al., 74 Civ. 3656 (S.D.N.Y.)).** That suit was dismissed from the bench on September 19, 1974, by Judge Weinfeld, because plaintiffs had commenced the action before sixty days had elapsed from service of the notice of violation, contrary to the clear direction of section 304(b) (42 U.S.C. §1857h-2(b))

*See Friends of the Earth v. U.S.E.P.A., 499 F. 2d 1118 (2d Cir. 1974), for a full discussion of the history of the TCP.

**NYCTA was not named as a party defendant in that earlier suit.

of the Act. Judge Weinfeld rejected plaintiffs' argument that the notice served on the State of New York in connection with Friends of the Earth v. U.S.E.P.A., 499 F. 2d 1118 (2d Cir. 1974), constituted notice to all of the defendants for the purposes of section 304(b) (42 U.S.C. §1857h-2(b)) of the Act.*

Plaintiffs did not appeal the dismissal of that earlier lawsuit. Instead, they waited for the sixty-day period to run and then commenced the instant action on October 11, 1974. At the same time plaintiffs brought on by order to show cause a motion seeking a preliminary injunction. In their motion plaintiffs requested preliminary injunctive relief identical to the relief demanded in the complaint; namely, that the District Court mandate and supervise compliance by the defendants with a court-fashioned plan and timetable for implementation of the TCP. By decision and order dated December 16, 1974, Judge Duffy denied plaintiffs' motion, with leave to renew the application after the position of the United States Environmental Protection Agency (hereinafter "USEPA") was clarified, but in any event after February 25, 1975. 389 F. Supp. 1394, 1396.

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*The notice of violation dated August 5, 1974 (reproduced at A93-A94), advised each defendant that "notice" had originally been given on February 28, 1974, when the Governor's counsel was served in the Friends of the Earth v. U.S.E.P.A. suit. (Page references to the Joint Appendix are preceded by the letter "A".)

On January 9, 1975, USEPA issued to the State and City defendants herein, pursuant to section 113 (42 U.S.C. §1857c-8) of the Act, a notice of violation and of the institution of enforcement proceedings regarding twelve TCP strategies.* A180. The violations charged were, in large part, identical to those raised herein by plaintiffs. A formal conference, as prescribed by section 113(a)(4) (42 U.S.C. §1857c-8(a)(4)), was held in early February, 1975, between USEPA officials and State and City representatives. A 180. Thereafter, there was an ongoing process of informal meetings which culminated in April, 1975, in the issuance against the State and City by USEPA of eight enforcement orders pertaining to eight TCP strategies*. And in late August and September, 1975, USEPA issued enforcement orders for the remaining four strategies** not included in the April orders.

Meanwhile, by order to show cause returnable July 30, 1975, plaintiffs brought on a second motion for a preliminary injunction, which motion is the subject of this appeal. Plaintiffs requested that the District Court enjoin NYCTA from increasing the fare charged for its mass transit facilities. In

*Strategies A-2, A-3, A-4, A-5, A-6, B-1A, B-1B, B-1C, B-3, B-5, B-7 and D-3.

**Strategies B-1C, B-3, B-7 and D-C.

addition, plaintiffs renewed their request for preliminary injunctive relief identical to the final relief demanded in the complaint.* On the return date the District Court asked all parties to brief further the question of the court's jurisdiction to hear plaintiffs' motion; the factual issues were reserved for a later hearing, if such a hearing were deemed appropriate.** Plf. Br., p. 7. On August 5, 1975, while the motion for a preliminary injunction was still sub judice, plaintiffs moved for partial summary judgment as to the four TCP strategies for which USEPA had not yet issued enforcement orders.

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* It was this latter request for relief that was originally denied by Judge Duffy in December, 1974. See p. 4, supra.

**It is disingenuous for plaintiffs to stress, as they do throughout their brief, that their expert testimony on the effects of a transit fare increase was uncontested by defendants. The only issues before the court below--and on this appeal--relate to the question of the appropriateness of the District Court's determination not to hear the preliminary injunction motion until USEPA and NYCTA had been joined. The litigation never reached the stage where defendants were required to controvert plaintiffs' proof."

THE DECISION BELOW

By decision dated August 28, 1975, the District Court denied in all respects plaintiffs' motion for a preliminary injunction. In addition, the Court dismissed the complaint as to NYCTA.

The District Court relied on several grounds in refusing to enjoin the transit fare increase and in dismissing the complaint as to NYCTA. First, the Court found that plaintiffs had failed to give NYCTA the statutory notice required by section 304(a) (42 U.S.C. §1857h-2(a)) as a prerequisite to suit under the Act. A5-A8. The Court also found that, whether or not the section 304(a) notice requirement was applicable, plaintiffs' failure ever to join NYCTA properly as a party denied that entity the ordinary "procedural due process to which other parties are entitled." A8. Third, the District Court determined that the complaint did not even state a claim against NYCTA, thus requiring dismissal under Rule 12(b), Federal Rules of Civil Procedure (hereinafter "F.R.C.P."). Finally, the District Court observed that the transit fare increase was not even a violation of the TCP and hence not actionable under section 304(a). A9-A10. Indeed, the District Court noted (A10) that this Court had upheld the validity of the TCP in the face of a challenge premised on the absence of any fare maintenance strategy. See Friends of the Earth v. U.S.E.P.A.,

499 F. 2d 1118, 1125 (2d Cir. 1974).

With regard to the plaintiffs' motion for preliminary enforcement of the TCP, the District Court held that such relief could not be granted in the absence of USEPA, as plaintiffs had been originally instructed in December, 1974. A13. The Court explained that USEPA involvement was desirable because of the highly technical aspects of TCP enforcement. Id. Since USEPA was already conducting parallel enforcement proceedings, the Court determined that USEPA participation should be required. A11-A14.

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING THE JOINDER OF USEPA AS A PARTY TO THIS ACTION.

USEPA initiated administrative enforcement proceedings against the defendants pursuant to section 113 (42 U.S.C. §1857c-8) of the Act shortly after the District Court denied plaintiffs' first motion for a preliminary injunction in December, 1974 (as is described at p. 4, supra). By the time plaintiffs brought on their second such motion in July, 1975 (which is the subject of this appeal), USEPA had engaged in a formal conference and several months of informal negotiations with State and City representatives. Enforcement orders had been issued for eight TCP strategies and administrative action regarding four other strategies was imminent. See A180-181, A183-184. With that factual background, the District Court concluded that preliminary injunctive relief enforcing the TCP strategies should not be considered until USEPA had been joined to permit a full inquiry into the status of the administrative enforcement proceedings which were being conducted simultaneously with this suit.

It is well-established that Rules 19 and 21, F.R.C.P., give a United States District Court broad discretion to order the joinder of additional parties. Moore v. Knowles, 482 F. 2d 1069, 1075 (5th Cir. 1973). Nothing in the Act or the pertinent portions of the legislative history referred to by plaintiffs indicates that that discretion has been suspended or in any way limited for suits brought under section 304. Consequently, the District Court's determination should be reviewed in the usual manner and the decision below not to consider plaintiffs' motion for a preliminary injunction enforcing the TCP until USEPA had been joined must be allowed to stand unless a clear abuse of discretion was involved. See Curacao Trading Co. v. Federal Insurance Co., 137 F. 2d 911, 914 (2d Cir. 1943), cert. denied, 321 U.S. 765 (1944).

Plainly, there was no such abuse. Section 113 (42 U.S.C. §1857c-8) of the Act, pursuant to which USEPA conducted its enforcement proceedings against defendants, permits the agency to pursue such enforcement through either administrative or judicial procedures, thus manifesting a congressional intent that USEPA have maximum flexibility to deal with the complex technical, social, political and economic problems inherent in the administration of the air pollution control program. The construction of the Act proferred by plaintiffs would

confuse, and perhaps destroy, that enforcement scheme. Specifically, if, as plaintiffs contend, a citizens' suit may proceed without consideration of parallel, ongoing administrative enforcement activities, it is likely that different, and possibly conflicting, enforcement orders would issue from USEPA and the court. (In fact, the USEPA enforcement orders issued against the present defendants require measures to implement the TCP different from those demanded by plaintiffs.) Neither the Act nor plaintiffs' papers indicate what would happen in the event of such parallel, inconsistent, enforcement, but two possibilities seem apparent: either the USEPA orders would have force independently of the judicial orders, or the judicial orders would nullify the USEPA action.

In the former situation plaintiffs' interpretation would lead to the absurd and undesirable result of overlapping and inconsistent enforcement, with the court and USEPA each proceeding in "blissful" ignorance of the other's activities; and the District Court would, of course, be denied the assistance of the factual record developed by USEPA in the administrative proceedings. On the other hand, if a citizens' suit would have the effect of nullifying USEPA enforcement, the administrative tool carefully fashioned by Congress is rendered impotent, for USEPA could never confidently engage in administrative enforcement if it anticipated

that the effort involved in months of conferences and investigations (as here) could be eradicated by a citizens' suit which fails to take cognizance of USEPA'S actions.

By the simple expedient of ordering the joinder of USEPA, the District Court was able to harmonize sections 113 (42 U.S.C. §1857c-8) and 304 (42 U.S.C. §1857h-2), the two enforcement provisions, and avoid these potential problems in the application of the Act.* Indeed, the considerations just stated suggest that the District Court's decision was not merely consistent with a sound exercise of discretion, but was required by Rule 19, F.R.C.P. See Rule 19(a); and see, e.g., Associated General Contractors, Inc., v. Laborers International Union, 476 F. 2d 1388, 1406-7 (Temp. Emer. Ct. App. 1973); Boles v. Greeneville Housing Authority, 468 F. 2d 476, 479 (6th Cir. 1972).

Nor are these principles undermined by plaintiffs' argument that the District Court has denied them the "speedy enforcement" intended by the Act. Plf. Br., p. 24. Specifically, it is plaintiffs' position that the only standards for adjudication of a citizens' suit instituted under section 304 are the requirements contained in an applicable air quality implementation plan,

*In Metropolitan Washington Coalition For Clean Air v. District of Columbia, 511 F. 2d 809 (D.C. Cir. 1975), relied on by plaintiffs (Plf. Br., p. 27) for the proposition that joinder of USEPA is not required, there was no parallel administrative enforcement proceeding which demanded the court's attention. There is nothing in that decision which indicates that joinder may not be ordered under different circumstances.

such as the TCP involved herein. Accordingly, plaintiffs conclude that the Court below erred in going beyond the TCP to take cognizance of the undeniably related USEPA enforcement proceedings.*

Whatever the merits of that argument in a different context, it carries no weight here. Although the District Court, in its December, 1974, decision, gave plaintiffs leave to renew their motion for a

*Insofar as plaintiffs seem to be challenging (Plf. Br., pp.11, 27-28, 30) the initial referral of this case to USEPA by the District Court in December, 1974 (389 F. Supp. 1394) under the doctrine of primary jurisdiction, we believe it is sufficient to note that plaintiffs failed to appeal that order. They should not be allowed at this point to undo what has already taken place pursuant to that order. The only issue here is whether it was appropriate for the District Court to take cognizance of the administrative proceedings which resulted from referral to USEPA in deciding plaintiffs' second motion for a preliminary injunction.

In any event, even if plaintiffs may properly raise the primary jurisdiction question here, their position is clearly without merit. The fact that Congress gave the District Courts original jurisdiction to hear citizens' suits does not mean, as plaintiffs apparently conclude, that initial referral to USEPA is improper under the Act. See Plf. Br., pp. 11, 27-28. Indeed, it is precisely when a District Court has original jurisdiction of a matter that the doctrine of primary jurisdiction may be invoked. E.g., Marine Terminal Ass'n v. Redeiriaktiebolaget Transatlantic, 400 U.S. 62, 68-9 (1970); United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-4 (1956).

Nor is this case like C.A.B. v. Aeromatic Travel Corp. 489 F. 2d 251 (2d Cir. 1974), notwithstanding plaintiffs' glib assertion to the contrary. Plf. Br., p. 24. In Aeromatic the agency itself had instituted the enforcement suit, thereby indicating its preference for a judicial disposition instead of an administrative resolution. As this Court concluded, it was obviously absurd to refer the matter back to the agency under those circumstances. But here the agency had clearly opted for the administrative process. Plf. Br., p. 34.

preliminary injunction after February 25, 1975, upon joinder of USEPA (389 F. Supp. at 1396), plaintiffs took no action at that time. Indeed, plaintiffs did not even satisfy the simple notice requirements of the Act which are a prerequisite to suit against USEPA. Instead, plaintiffs were satisfied to let USEPA pursue its enforcement activities against defendants. Only in July, 1975, some seven months after the District Court's initial decision, were plaintiffs sufficiently aroused to reactivate this litigation by the prospect of a transit fare increase, a perennial subject of public attention. Plaintiffs are thus on weak ground in arguing that joinder of USEPA would delay "speedy enforcement," since they had ample time to clear that obstacle in the months preceding their second motion, when this case lay dormant.

Finally, further support for the District Court's decision regarding joinder of USEPA is found in plaintiffs' motion papers, for plaintiffs themselves placed into issue the effectiveness of USEPA's administrative enforcement proceedings. The Sandler Affidvit of July 30, 1975 (A159-A162), for example, presented a detailed attack upon USEPA efforts to enforce the various TCP strategies. Indeed, Mr. Sandler requested that the District Court require USEPA "to report specifically on whether there has in fact been compliance, both timely and of satis-

factory nature, with each and every deadline" imposed by the April, 1975, enforcement orders. A162. Similarly, the Schoenbrod Affidavit of July 28, 1975 (A132-A137), contended that lax USEPA enforcement was one justification for issuance of a preliminary injunction temporarily enforcing the TCP. A132, A135. And by letter to Judge Duffy dated August 26, 1975 (not reproduced in the Joint Appendix), when plaintiffs' motion for a preliminary injunction was still sub judice, plaintiffs again argued to the District Court that the slow progress of USEPA enforcement and purported noncompliance by defendants with already-issued administative orders required judicial action.

In sum, the District Court was well within the bounds of its discretion in ordering the joinder of USEPA. By requiring such joinder, the decision below advances an orderly administration of the Act which ensures that, where USEPA enforcement parallels a lawsuit such as this, the agency and the court will work in harmony, rather than at cross-purposes. Moreover, the District Court will have the benefit of the full administrative record developed by USEPA. These considerations more than outweigh whatever delay may ensue from the mechanics of joinder, especially since such delay, at least in part, will have been occasioned by plaintiffs' desultory approach to this litigation.

Finally, plaintiffs' motion papers, which contain broad criticism of USEPA's enforcement efforts in support of plaintiffs' request for preliminary injunctive relief, alone constitute a sufficient basis for the District Court to have concluded that the joinder of USEPA was appropriate.

The soundness of the decision below under these circumstances cannot be obscured by plaintiffs' extravagant claims that the District Court has destroyed the citizens' suit remedy under section 304. Plf. Br., pp. 12, 31-5. The District Court has done nothing more than conduct this litigation in accordance with the usual principles of federal civil procedure.

POINT II

THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION RESTRAINING NYCTA FROM INCREASING THE TRANSIT FARE.

In Point II of their brief plaintiffs attack the District Court's decision to deny their motion for a preliminary injunction restraining a fare increase by NYCTA. The District Court ruled that NYCTA had not been properly made a party to this suit because plaintiffs failed to comply with the notice requirements of the Act and ordinary due process and that, accordingly, no judicial action could be taken until plaintiffs corrected that defect. Plaintiffs argue here that NYCTA is only to be joined "as a party necessary to grant full

relief" (Plf. Br., p. 44) and that, in light of this Court's decisions in Conservation Society of Southern Vermont v. Secretary, 508 F. 2d 927 (1974), vacated on other grounds, ___U.S.____ (1975), and Natural Resources Defense Council, Inc. v. Callaway, ____F. 2d____, No.75-7048 (September 9, 1975), such joinder is appropriate under section 304(e) (42 U.S.C. §1857h-2(e)) without compliance with the 60 days' notice requirement of section 304(a) (42 U.S.C. §1857h-2(a)). Alternatively, plaintiffs contend that the notice requirement of the Act was satisfied as to NYCTA by notices given to the State of New York and the Metropolitan Transportation Authority, NYCTA's sister public authority.

Plaintiffs' argument regarding section 304(e) is curious, for they concede that the transit fare increase does not constitute a violation of the TCP actionable under section 304(a) (Plf. Br., pp. 40, 44)* and they present no other statutory ground which could serve as an alternative jurisdictional basis for suit

*Since plaintiffs make this concession, there is no purpose to our responding to their alternative argument that they satisfied the notice requirement of section 304(a). For even if plaintiffs did comply with that requirement, they admit here that, as to the transit fare increase, they cannot state a claim under the Act upon which relief can be granted, because section 304(a) only permits suits as to "violations."

against NYCTA.* Rather, it is apparently plaintiffs' position that NYCTA may be joined under section 304(e) solely for the purpose of issuing a preliminary injunction under Rule 65, F.R.C.P., and the All-Writs Act, 28 U.S.C. §1651, even though no final relief could be granted under any law restraining NYCTA from increasing the transit fare. Plf. Br., pp. 44-46.

That argument is patently absurd. As Judge Learned Hand so aptly stated, a court of equity "cannot lawfully enjoin the world at large." Alemite Manufacturing Corp. v. Staff, 42 F. 2d 832, 833 (2d Cir. 1930). Plaintiffs simply cannot invoke the equitable powers of the District Court against NYCTA unless they can show that the transit fare increase itself violates some provision of law. See House of Materials, Inc. v. Simplicity Pattern Co., 298 F. 2d 867 (2d Cir. 1962). And that is as true whether plaintiffs are proceeding within the broad sweep of the All-Writs Act, 28 U.S.C. §1651 (assuming that statute were somehow apposite), or the more limited provisions of Rule 65, F.R.C.P. See, e.g., DeBeers Consolidated Mines, Ltd. v.

*See Conservation Society of Southern Vermont v. Secretary, 508 F. 2d 927 (2d Cir. 1974), vacated on other grounds, ___ U.S. __ (1975), and National Resources Defense Council, Inc. v. Callaway, ___ F.2d ___, No. 75-7048 (2d Cir. September 9, 1975), which interpret section 304(e) to permit suits based upon other jurisdictional statutes.

United States, 325 U.S. 212, 220-21 (1945); United States v. Professional Air Traffic Controllers Organization (PATCO), 438 F. 2d 79, 81-2 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971). In reality, plaintiffs are arguing that Rule 65 and the All-Writs Act themselves confer equitable jurisdiction on the District Court which, via section 304(e) of the Act, may be used solely to join NYCTA for the purpose of enjoining the fare increase by preliminary injunction. But it is well-established that Rule 65 and the All-Writs Act are not jurisdictional; there must be some independent statutory basis to support the application of the equitable powers contained therein. E.g., Mead v. Parker, 464 F. 2d 1108, 1112 (9th Cir. 1972); Commercial Security Bank v. Walker Bank & Trust Co., 456 F. 2d 1352, 1355 (10th Cir. 1972); Brittingham v. United States Commissioner of Internal Revenue, 451 F. 2d 315, 317 (5th Cir. 1971); United States ex rel. Wisconsin v. First Federal Savings & Loan Ass'n, 248 F. 2d 804, 808-9 (7th Cir. 1957), cert. denied, 355 U.S. 957 (1958); cf. United States ex rel. Vasse' v. Durning, 152 F. 2d 455 (2d Cir. 1945). By their own admission, plaintiffs cannot show any statute

which would govern the transi fa_e increase.*

The District Court was thus obviously correct in concluding that NYCTA was not properly a party to this action with regard to the transit fare increase and that, hence, there was no lawful basis for the issuance of a preliminary injunction. And the dismissal of the complaint as to NYCTA was appropriate since, as plaintiffs' brief on this appeal shows, no actionable claim can be stated against NYCTA regarding the transit fare. Moreover, even if plaintiffs had been able to state a claim against NYCTA and even if they could have proceeded on that claim without complying with the notice requirement of section 304(a), i.e., via

*Plaintiffs' real problem is with the TCP itself. Having failed to persuade this Court that the TCP was deficient because it made no provision for the transit fare (Friends of the Earth v. U.S.E.P.A., 499 F. 2d 1118, 1125 (2d Cir. 1974)), they now seek to amend the TCP through the novel approach of joining NYCTA solely for the purpose of issuing a preliminary injunction against the fare increase. The proper course for plaintiffs, as we suggested below, is to persuade USEPA to revise the TCP pursuant to section 110(a)(2)(H)(42 U.S.C. §1857c-5(a)(2)(H)).

section 304(e)),* plaintiffs still failed to satisfy elementary standards of due process as to NYCTA. Plaintiffs' contention that they were confused about NYCTA'S corporate identity (Plf. Br., pp. 38-39), and that service on the Metropolitan Transportation Authority (hereinafter "MTA") was therefore good service as to NYCTA (Plf. Br., pp. 46-8), is totally specious. The legal distinction between MTA and NYCTA is clearly set forth in New York Law. See New York Public Authorities Law, Titles 9 and

*It should be noted, also, that even if plaintiffs could find some basis for challenging the transit fare increase, they are barred by the doctrine of res judicata from arguing that they were not required to give 60 days' individual notice to NYCTA prior to joinder. That is so because, in dismissing plaintiffs' earlier complaint in Friends of the Earth, et al. v. Wilson, et al., 74 Civ. 3656 (see pp. 3-4, supra), Judge Weinfeld determined that section 304 of the Act required such strict compliance with the notice provisions. Plaintiffs did not appeal Judge Weinfeld's decision, so it binds them here. See, e.g., Durfee v. Duke, 375 U.S. 106,112 (1963); Stoll v. Gottlieb, 305 U.S. 165 (1938); City of Buffalo v. Plainfield Hotel Corp., 177 F. 2d 425, 427 (2d Cir. 1949), cert. denied, 339 U.S. 942 (1950).

Nor do this Court's recent decisions in Natural Resources Defense Council, Inc. v. Callaway, _ F. 2d ___, No.75-7048 (September 9, 1975) and Conservation Society of Southern Vermont v. Secretary, 508 F. 2d 927 (1974), offer plaintiffs an escape from the res judicata effect of Judge Weinfeld's decision. Plaintiffs had a full and fair opportunity to litigate before Judge Weinfeld the question of using section 304(e) as an alternative to the notice requirements of section 304(a). Accordingly, this Court's subsequent decisions interpreting section 304(e) (see p. 18n., supra) do not destroy the res judicata effect of Judge Weinfeld's decision. See Ripperger v. A.C. Allyn & Co., 113 F. 2d 332 (2d Cir.), cert denied, 311 U.S. 695 (1940).

11 (McKinney's ed. 1970); Abrams v. New York City Transit Authority, 48 AD 2d 69, 74 (1st Dep't 1975) (plaintiff Abrams was represented by Mr. Schoenbrod, one of plaintiffs' counsel here); Glen v. Rockefeller, 61 Misc. 2d 942, 946-48 (Sup. Ct. N.Y. Co.), aff'd on opinion below, 34 AD 2d 930 (1st Dep't 1970). There is, therefore, absolutely no justification for plaintiffs' cavalier attitude on this issue.

CONCLUSION

THE ORDER OF THE DISTRICT COURT 1) DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION TEMPORARILY ENFORCING THE TCP 2) DENYING PLAINTIFFS' MOTION TO PRELIMINARILY ENJOIN A TRANSIT FARE INCREASE, AND 3) DISMISSING THE COMPLAINT AS TO NYCTA, SHOULD BE AFFIRMED.

December 10, 1975

Respectfully submitted,

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City, County and State of New York, ss.:

BRUCE GARNER

being duly sworn, says, that on the 10 day of DEC., 1975 at No. 2 WORLD TRADE CTR. in the Borough of MAN'H. in The City of New York, he served three copies of the annexed BRIEF upon LOUIS J. LEFKOWITZ Esq., the attorney for the STATE in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 10 day of DEC., 1975

[signature]

Bruce Garner

DAVID W. FISHER
Notary Public, State of New York
Qualified in ... County
Commission Expires March 30, 1977

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

Michael Bolrow

being duly sworn, says, that on the 10 day of DEC., 1975 at No. 15 W. 44TH ST. in the Borough of MAN'H. in The City of New York, he served three copies of the annexed BRIEF upon NATURAL RESOURCES DEFENSE COUNCIL, INC. ~~Esq.~~, the attorney for the PLTFFS-APPLTS in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 10 day of DEC., 1975

[signature]

Michael Bolrow

...h 30, 1977

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York ss.:

BRUCE GARNER

being duly sworn, says, that on the 10 day of DEC., 1975 at No. 370 JAY ST. in the Borough of BKLYN. in The City of New York, he served three copies of the annexed BRIEF upon JAMES McMAHON Esq., the attorney for the N.Y.C.T.A. in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 10 day of DEC., 1975

[signature]

Bruce Garner

Notary Public ...
Qualified ... County
Commission Expires ...h 30, 1977